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CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIF.
LOS ANGELES

Henry C. Wang (SBN 196537)
Email: hwang@reedsmith.com
William R. Overend (SBN 180209)
Email: woverend@reedsmith.com
Michael A. Garabed (SBN 223511)
Email: mgarabed@reedsmith.com
Karen Wan (SBN 248542)
Email: kwang@reedsmith.com
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071-1514
Telephone: +1 213 457 8000
Facsimile: +1 213 457 8080

Attorneys for Plaintiff
PINKBERRY, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 08-05926 R (RZx)
Case No.

PINKBERRY, INC., a California
corporation,

Plaintiff,

vs.

PINGO FOODS CORPORATION, d/b/a.
PINGO YOGURT, a California
corporation,

Defendant.

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF FOR:**

1. **FEDERAL TRADE DRESS
INFRINGEMENT**
2. **FEDERAL TRADEMARK
INFRINGEMENT;**
3. **FEDERAL UNFAIR
COMPETITION;**
4. **FEDERAL FALSE
DESIGNATION OF ORIGIN;**
5. **STATE UNFAIR COMPETITION;**
6. **STATE INJURY TO BUSINESS
REPUTATION; AND**
7. **UNJUST ENRICHMENT**

1 Plaintiff Pinkberry, Inc. ("Pinkberry") for its Complaint against Defendant
2 Pingo Foods Corporation d/b/a Pingo Yogurt ("Pingo Foods"), alleges as follows:
3

4 **JURISDICTION AND VENUE**

5 1. This is a complaint for injunctive relief and damages based on trademark
6 infringement, trade dress infringement, unfair competition, and false designation of
7 origin under 15 U.S.C. Section 1051 *et seq.*, as amended (hereinafter "Lanham Act"),
8 as well as related state law claims.

9 2. This Court has subject matter jurisdiction over this action under the
10 Lanham Act, 15 U.S.C. § 1121; 28 U.S.C. § 1338(a) (any act of Congress relating to
11 patents, copyrights and trademarks); and the doctrines of ancillary and pendant
12 jurisdiction.

13 3. This Court has personal jurisdiction over Pingo Foods because it
14 maintains its place of business and conducts business in the State of California.

15 4. Venue is proper in this district under 28 U.S.C. § 1391(b)(2) and (3)
16 because a substantial part of the events giving rise to the claims occurred in this
17 district, a substantial part of the property that is the subject of the action is situated in
18 this district, and Pingo Foods was and is subject to personal jurisdiction in this district
19 at the time the action was commenced.
20

21 **PARTIES**

22 5. Pinkberry is, and at all times relevant hereto has been, a corporation
23 organized and existing under the laws of the State of California, having a place of
24 business at 6310 San Vicente Boulevard, Suite 100, Los Angeles, California 90048.
25 Pinkberry's primary line of business is the sale of frozen yogurt with optional
26 toppings that include, among other things, fresh fruit, cereals and nuts, as well as
27 smoothies (the "Pinkberry Products") under the distinctive Pinkberry branding in a
28 unique café-style restaurant setting. Pinkberry operates stores throughout Los

1 Angeles and elsewhere within this district as well as in interstate commerce.

2 6. On information and belief, Pingo Foods is, and at all times relevant
3 hereto has been, a California corporation, having a place of business at 35 West
4 Valley Boulevard, Alhambra, California 91801. Pingo Foods' primary line of
5 business is the sale of frozen yogurt with optional toppings that include, among other
6 things, fresh fruit, cereals and nuts, as well as smoothies, in a café-style restaurant
7 setting which deliberately imitates Pinkberry's highly distinctive branding and trade
8 dress.

9 SUMMARY OVERVIEW OF COMPLAINT

10
11 7. Much the way that Apple Computers revolutionized the computer
12 industry, raising the design standards and operating systems of the previously staid
13 "beige box" computer market, Pinkberry has revolutionized the yogurt business by
14 offering a product selection and consumer experience that are uniquely Pinkberry.
15 Since its opening, Pinkberry has been featured in numerous national publications such
16 as Time, Fortune, Los Angeles Times, New York Times, and Reuters, and has been
17 the subject of countless internet blogs. See, true and correct copies of a sampling of
18 articles discussing Pinkberry attached hereto as **Exhibit "A"** and incorporated by
19 reference. These national publications have recognized the unique and highly
20 distinctive look and feel of Pinkberry stores, noting, for example, that Pinkberry was
21 responsible for "help[ing to] revive the sagging frozen yogurt industry"¹ and
22 "develop[ing] a look that helped create a cult factor."² Among many of its other
23 acclaims and accolades, *The Los Angeles Times* has called Pinkberry "a phenomenon,
24 creating four-times-a-week addicts and spawning celebrity devotion, along with a
25

26 ¹ Hwang & Lee, *Simple by Design*, TIME MAGAZINE, March 12, 2008.

27 ² Boyle, *Starbucks Founder Bites Into Pinkberry*, FORTUNE, October 16, 2007.
28

1 chorus of imitators..."³ More recently, *The Los Angeles Times* opinion section made
2 the tongue-in-cheek suggestion that the Los Angeles Coliseum should be renamed
3 "Pinkberry Coliseum."⁴ Indeed, Pinkberry's popularity, success, and fame in the
4 yogurt business are unparalleled. Pinkberry was even showcased in an American
5 Express national television advertisement. See true and correct copies of the
6 American Express television advertisement stills, attached hereto as **Exhibit "B"** and
7 incorporated by reference.

8 8. Pinkberry's success has been noted by its competitors and would-be
9 competitors, including Pingo Foods. On information and belief, Pingo Foods'
10 branding is a deliberate imitation of the Pinkberry branding and was implemented to
11 build market share and a customer base by exploiting Pinkberry's renowned trade
12 name, trademarks and trade dress and wrongfully trading upon Pinkberry's reputation
13 and goodwill.

14 9. Pingo Foods has sought to profit from Pinkberry's success by using its
15 highly similar PINGO YOGURT trademark (the "PINGO YOGURT Mark") to
16 market and sell products that are identical or nearly identical to the Pinkberry
17 Products, thereby infringing upon Pinkberry's registered trademarks, service marks,
18 and trade name (collectively, the "PINKBERRY Marks"). Not only does Pingo Foods
19 use a confusingly similar trademark to sell goods that directly compete with
20 Pinkberry's goods, but it has also misappropriated Pinkberry's highly distinctive and
21 non-functional trade dress.

22 10. Pingo Foods' wrongful acts create a likelihood of confusion in the minds
23 of consumers as to the sponsorship, endorsement, association, or approval of Pingo
24 Foods' products by Pinkberry. Accordingly, Pinkberry has been and continues to be
25 damaged by Pingo Foods' infringing activities, thereby necessitating this lawsuit.

26 ³ Menn, *Welcome Jolt for Pinkberry*, LOS ANGELES TIMES, October 16, 2007

27 ⁴ Zirin, *The Pinkberry Coliseum*, LOS ANGELES TIMES, June 29, 2008

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

A. Pinkberry's Creation And First Use Of Its PINKBERRY Trademarks, Service Marks, Trade Name And Trade Dress

11. Commencing in or about January of 2005, Pinkberry created, developed and began marketing and selling the Pinkberry Products through its distinctive Pinkberry restaurants.

12. Since approximately January of 2005, Pinkberry has been using and is currently using its PINKBERRY Marks in connection with the marketing and sale of its Pinkberry Products, restaurants and related products and services. Pinkberry owns all rights in and to the federal registrations for the following PINKBERRY Marks, each of which is valid and subsisting:

<u>TRADEMARK</u>	<u>REG. NO.</u>	<u>ISSUE DATE</u>	<u>GOODS AND SERVICES</u>
PINKBERRY	3,302,143	October 2, 2007	Frozen yogurt; frozen yogurt based dessert, combined with fruit, nuts, cereal and shaved ice and rice cakes; and smoothies
PINKBERRY	3,460,697	July 8, 2008	Restaurant services; restaurants; take-out restaurant services, café-restaurants; fast-food restaurants
Stylized Leaf and Berry Swirl Design	3,461,027	July 8, 2008	Express restaurant services, food kiosk services, and carry-out restaurant services featuring frozen yogurt-based desserts, frozen dairy desserts, smoothies and shaved ice
PINKBERRY & Stylized Leaf and Berry Swirl Design	3,460,702	July 8, 2008	Restaurant services; restaurants; take-out restaurant services; café-restaurants; fast-food restaurants

See true and correct copies of those registrations attached hereto as Exhibits "C" through "F" and incorporated by reference.

1 13. Since Pinkberry opened its first restaurant in the United States in or about
2 January of 2005, its Pinkberry Products, restaurants and services have prominently
3 featured the PINKBERRY Marks to identify them and to identify Pinkberry as their
4 source.

5 14. In addition, the Pinkberry restaurants have been characterized by a
6 unique and inherently distinctive trade dress which has been used to identify them and
7 to identify Pinkberry as their source. The Pinkberry storefront, décor, layout, and
8 style are unique and distinctive. The signage is green with pink accents, with metal
9 blue and green awnings on the storefront. The restaurants' interior presents a
10 contemporary and refreshing café-style environment that is painted in pastel colors,
11 such as peach, green and blue, with green circles on the glass and counter. The
12 minimalist décor showcases unique and distinctive non-functional design elements
13 that include, among other things, glass walls, pebble stone flooring and modern
14 designer furniture, such as white tables, modern colored plastic chairs, slatted natural
15 wooden benches and modern hanging lamps (e.g., Le Klint pendant lights).
16 Reflecting Pinkberry's modern style, the counter layout includes a minimalist food
17 preparation area that is behind open, glass-plated countertops with uniform trays of
18 toppings. These unique design features and characteristics, taken as a whole, create an
19 inherently distinctive and non-functional trade dress (the "PINKBERRY Trade
20 Dress") which readily identifies Pinkberry and its products. See true and correct
21 copies of photos depicting examples of the PINKBERRY Trade Dress (including
22 Pinkberry's "store concept" Internet webpage promoting its unique PINKBERRY
23 Trade Dress) attached hereto as **Exhibit "G"** and incorporated by reference.

24 15. Pinkberry has expended substantial time, money, and effort in promoting
25 its Pinkberry Products, restaurants and related products and services through the use
26 of its PINKBERRY Marks and Trade Dress and in enforcing its rights in its
27 PINKBERRY Marks and Trade Dress throughout the United States.

28 16. By virtue of Pinkberry's investments, the PINKBERRY Marks and Trade

1 Dress have become associated in the minds of consumers and in the minds of the
2 general public with Pinkberry and have become assets of substantial value to
3 Pinkberry and symbols of its quality products and valuable goodwill. As a result of its
4 efforts and success, in less than three (3) years, Pinkberry has expanded from one
5 location in West Hollywood, California to over 60 locations in the United States, with
6 current plans to continue to expand nationally and to enter international markets.

7 17. Since January 2005, the Pinkberry Products, restaurants and services, as
8 identified by the PINKBERRY Marks and Trade Dress, have been widely used and
9 recognized in the United States. *See e.g. Hwang & Lee, Simple by Design, TIME*
10 *MAGAZINE*, March 12, 2008 (describing Pinkberry's successes) and other articles
11 attached hereto as **Exhibit "A"** and incorporated by reference.

12
13 **B. Pingo Foods' Unlawful Conduct**

14 18. On information and belief, since in or about March 2007, Pingo Foods
15 has operated a café-style restaurant in which it sells the same products as the
16 Pinkberry Products under the confusingly similar PINGO YOGURT Mark and a
17 colorable imitation of the distinctive PINKBERRY Trade Dress. Among other things,
18 Pingo Foods has misappropriated unique and non-functional design elements of the
19 PINKBERRY Trade Dress such as pastel colors of peach, green and blue, green
20 circles on glass walls, glass walls, pebble floors, modern designer furniture (including
21 white tables, modern colored plastic chairs, and modern hanging lamps) and a food
22 preparation area that is behind open, glass-plated countertops with uniform trays of
23 toppings. *See* true and correct copies of photographs of Pingo Foods' imitation of the
24 PINKBERRY Mark and Trade Dress, attached hereto as **Exhibit "H"** and
25 incorporated by reference.

26 19. Pingo Foods' use of its PINGO YOGURT Mark and Trade Dress in the
27 promotion, advertising and sale of directly competitive frozen yogurt products and
28 services constitutes the use in commerce of colorable imitations, copies and

1 reproductions of the PINKBERRY Marks and Trade Dress, is deceptively and
2 confusingly similar to Pinkberry's use of the PINKBERRY Marks and Trade Dress
3 for identical products and is likely to cause confusion, mistake, or deception in the
4 minds of the public.

5 20. Despite written demands by Pinkberry, Pingo Foods has used and is
6 continuing to use and infringe the PINKBERRY Marks and Trade Dress.

7 21. Pinkberry has not consented to, sponsored, endorsed, or approved Pingo
8 Foods' use of the PINKBERRY Marks or Trade Dress in connection with any of
9 Pingo Foods' products or services.

10 22. Pingo Foods' acts of improper use and promotion of the PINKBERRY
11 Marks and Trade Dress are likely to cause confusion or mistake in the minds of
12 consumers as to the sponsorship, endorsement, association, or approval of Pingo
13 Foods' products and services by Pinkberry. Likelihood of confusion is and will only
14 be exacerbated by the fact that Pingo Foods' products and services are directly
15 competitive with and/or highly related to Pinkberry's products and services. Pingo
16 Foods' and Pinkberry's products are likely to be purchased by the same types of
17 consumers, advertised and promoted in the same and/or similar advertising channels,
18 and marketed and sold in similar retail establishments.

19 23. On information and belief, the foregoing actions of Pingo Foods have
20 been knowing, deliberate, willful, and in utter disregard of Pinkberry's rights.

21 24. Pingo Foods' unlawful activity results in irreparable harm and injury to
22 Pinkberry. Among other harms, it deprives Pinkberry of its absolute right to
23 determine the manner in which its image is presented to the general public through its
24 products and services; deceives the public as to the origin and sponsorship of such
25 products and services; wrongfully trades upon, and cashes in on, Pinkberry's
26 reputation and exclusive rights in its trademarks; and irreparably harms and injures
27 Pinkberry's business reputation. As a direct and proximate result of Pingo Foods'
28 conduct set forth above, Pinkberry has been injured and damaged in an amount to be

1 proven.

2 25. Pingo Foods' conduct is continuing, and will continue, unless enjoined
3 by the Court.

4 26. Unless Pingo Foods is enjoined from engaging in the infringing conduct
5 described above, Pinkberry will suffer irreparable injury and further damage. Thus, it
6 would be difficult to ascertain the amount of compensation which could afford
7 Pinkberry adequate relief for the acts of Pingo Foods present and threatened, and
8 Pinkberry's remedy at law is not adequate to compensate for said harm and damage.

9
10 **FIRST CLAIM FOR RELIEF**

11 **TRADE DRESS INFRINGEMENT**

12 **UNDER 15 U.S.C. 1125(a)(1)(A) [LANHAM ACT § 43]**

13 27. Pinkberry refers to paragraphs 1 through 26, above, and incorporates the
14 allegations thereof as if herein set forth in their entirety.

15 28. Pinkberry has continuously used and is still using its PINKBERRY Trade
16 Dress in conjunction with its products, services and restaurants. Pinkberry uses its
17 non-functional, distinctive and unique PINKBERRY Trade Dress to identify and
18 distinguish its products, services and restaurants from the products, services and
19 restaurants of others.

20 29. Pinkberry has invested substantial resources, time and effort in
21 advertising and promoting its products, services and restaurants using the
22 PINKBERRY Trade Dress in interstate commerce. Pinkberry's products, services and
23 restaurants have been and continue to be sold under and in connection with the
24 PINKBERRY Trade Dress. By virtue of such efforts by Pinkberry and Pinkberry's
25 continuous use of the PINKBERRY Trade Dress, the PINKBERRY Trade Dress has
26 become associated in the minds of consumers and the public with Pinkberry.
27 Pinkberry has built up valuable goodwill in the PINKBERRY Trade Dress.

28 30. The PINKBERRY Trade Dress is a source of identity associated with

1 Pinkberry and is entitled to broad protection.

2 31. Although Pingo Foods is not affiliated in any way with Pinkberry, Pingo
3 Foods has infringed and continues to infringe upon Pinkberry's rights by marketing,
4 advertising, and distributing its products, services and restaurants using a trade dress
5 which is identical to and/or confusingly similar to the PINKBERRY Trade Dress in
6 connection with Pingo Foods' sales, advertising, marketing and restaurant service
7 activities. The goods and services of Pinkberry and Pingo Foods are distributed
8 through the same and/or related channels of trade.

9 32. On information and belief, Pingo Foods has had actual notice of
10 Pinkberry's PINKBERRY Trade Dress and Pinkberry's ownership and use of said
11 trade dress in connection with its products, services and restaurants.

12 33. The infringing use and copying by Pingo Foods of a virtually identical
13 and/or confusingly similar trade dress to the PINKBERRY Trade Dress is likely to
14 cause and has caused confusion, mistake and/or deception of consumers and the
15 general public, as to the products, services and restaurants offered by Pinkberry and
16 those offered by Pingo Foods. Pingo Foods' copying and use of a trade dress which is
17 identical and/or confusingly similar to that used in connection with Pinkberry's
18 products, services and restaurants is likely to confuse and deceive consumers and the
19 public into believing that Pingo Foods' products, services and restaurant are in some
20 way backed by, sponsored by, licensed by, authorized by, approved by, franchised by,
21 associated with or otherwise connected with Pinkberry. Such conduct is deceiving to
22 the public.

23 34. Pingo Foods' infringement of the PINKBERRY Trade Dress, including
24 its use of the design, layout and non-functional aspects of the Pinkberry Products,
25 services and restaurants has been willful. On information and belief, Pingo Foods has
26 intentionally adopted, copied and used the PINKBERRY Trade Dress in connection
27 with Pingo Foods' products, services and restaurant in order to trade on the goodwill,
28 reputation and quality associated with the PINKBERRY Trade Dress and to "palm

1 off' Pingo Foods' products and services as Pinkberry's.

2 35. The above acts by Pingo Foods constitute trade dress infringement. By
3 reason of the foregoing, Pingo Foods has violated and will continue to violate Section
4 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), unless enjoined by the Court.

5 36. Such conduct, confusion and deception is causing, and unless enjoined by
6 this Court, will continue to cause Pinkberry immediate and irreparable injury and
7 damage in an amount to be proven at trial.

8 37. Pinkberry has no adequate remedy at law unless Pingo Foods' conduct is
9 enjoined by this Court.

10
11 **SECOND CLAIM FOR RELIEF**

12 **TRADEMARK INFRINGEMENT**

13 **UNDER 15 U.S.C. § 1114 [LANHAM ACT § 32]**

14 38. Pinkberry repeats paragraphs 1 through 37, above, and incorporates the
15 allegations thereof as if herein set forth in their entirety.

16 39. Pinkberry has used its PINKBERRY Marks in connection with, and to
17 identify the source of the Pinkberry Products and to distinguish those products from
18 similar products offered by other companies, by, and without limitation, prominently
19 displaying the PINKBERRY Marks on Pinkberry's storefronts, employees' uniforms,
20 cups, to-go containers and bags, and advertising and promotional materials distributed
21 throughout the United States, including, without limitation, on its website at
22 www.pinkberry.com.

23 40. Pingo Foods' use of the PINGO YOGURT Mark in connection with the
24 advertising, promotion and sale of directly competitive products and services infringes
25 Pinkberry's registered PINKBERRY Marks and is likely to cause confusion, mistake,
26 or deception of the public as to the identity, source and/or sponsorship of Pingo
27 Foods' products, restaurant and services.

28 41. Pingo Foods' use of the PINGO YOGURT Mark has been made

1 notwithstanding Pinkberry's well-known and prior-established rights in the
2 PINKBERRY Marks and with both actual and constructive notice of Pinkberry's
3 federal trademark registrations and rights under 15 U.S.C. § 1072.

4 42. On information and belief, Pingo Foods has intentionally adopted and
5 continued to use the PINGO YOGURT Mark with the intent of causing confusion,
6 mistake, or deception of the public as to the identity and source of Pingo Foods'
7 products, restaurant and services.

8 43. The above acts by Pingo Foods constitute trademark infringement. By
9 reason of the foregoing, Pingo Foods has violated and will continue to violate § 32(1)
10 of the Lanham Act, 15 U.S.C. § 1114(1), unless enjoined by the Court.

11 44. Pingo Foods' infringing activities have caused, and unless enjoined by
12 this Court, will continue to cause substantial, immediate, and irreparable injury and
13 other damage to Pinkberry's business, reputation and goodwill.

14 45. Pinkberry has no adequate remedy at law unless Pingo Foods' infringing
15 conduct is enjoined by this Court.

16 17 **THIRD CLAIM FOR RELIEF**

18 **UNFAIR COMPETITION**

19 **UNDER 15 U.S.C. § 1125(a) [LANHAM ACT § 43(a)]**

20 46. Pinkberry repeats paragraphs 1 through 45, above, and incorporates the
21 allegations thereof as if herein set forth in their entirety.

22 47. Pingo Foods' improper use of the PINGO YOGURT Mark in connection
23 with the advertising, promotion and sale of directly competitive products and services
24 constitutes unfair competition under 15 U.S.C. § 1125(a).

25 48. Pingo Foods' use of the PINGO YOGURT Mark is likely to cause
26 confusion, mistake, or deception among consumers as to whether Pingo Foods is
27 affiliated, connected or associated with Pinkberry, and as to whether Pinkberry is the
28 source of Pingo Foods' products and commercial activities or has sponsored or

1 approved them.

2 49. Pingo Foods' unfair competition has caused and will continue to cause
3 irreparable injury and other damage to Pinkberry's business, reputation and goodwill
4 in its PINKBERRY Marks for which Pinkberry has no adequate remedy at law.

5
6 **FOURTH CLAIM FOR RELIEF**

7 **FALSE DESIGNATION OF ORIGIN**

8 **UNDER 15 U.S.C. § 1125(a) [LANHAM ACT § 43(a)]**

9 50. Pinkberry repeats paragraphs 1 through 49, above, and incorporates the
10 allegations thereof as if herein set forth in their entirety.

11 51. Pingo Foods' PINGO YOGURT Mark is such a colorable imitation and
12 copy of the PINKBERRY Marks that Pingo Foods' use thereof in connection with
13 directly competitive products and services is likely to cause confusion, mistake, or
14 deception as to whether Pingo Foods is affiliated, connected, or associated with
15 Pinkberry, and as to whether Pinkberry is the source of Pingo Foods' products,
16 services, or commercial activities or has sponsored or approved them.

17 52. Pingo Foods' use of the PINGO YOGURT Mark is a false designation of
18 the origin of Pingo Foods' products, services or commercial activities and/or a false or
19 misleading representation concerning such products, services or commercial activities
20 under 15 U.S.C. § 1125(a).

21 53. As a direct and proximate result of the violations identified herein,
22 Pinkberry has been injured in its business and property. Pinkberry has suffered
23 damages in an amount to be proven at trial.

24
25 **FIFTH CLAIM FOR RELIEF**

26 **UNFAIR COMPETITION**

27 **UNDER CALIFORNIA BUSINESS AND PROFESSIONS CODE**

28 **§ 17200 et seq.**

1 54. Pinkberry repeats paragraphs 1 through 53, above, and incorporates the
2 allegations thereof as if herein set forth in their entirety.

3 55. Pingo Foods' activities as stated herein constitute unfair competition and
4 an infringement of Pinkberry's common law trademark rights in the PINKBERRY
5 Marks in the State of California.

6 56. Pursuant to California Business and Professions Code § 17203, Pinkberry
7 is entitled to preliminary and permanent injunctive relief ordering Pingo Foods to
8 cease this unfair competition, as well as disgorgement of all of Pingo Foods' profits
9 associated with this unfair competition.

10
11 **SIXTH CLAIM FOR RELIEF**
12 **INJURY TO BUSINESS REPUTATION**
13 **CALIFORNIA COMMON LAW**

14 57. Pinkberry repeats paragraphs 1 through 56, above, and incorporates the
15 allegations thereof as if herein set forth in their entirety.

16 58. Pingo Foods' use of the PINGO YOGURT Mark injures and creates
17 likelihood of injury to Pinkberry's business reputation because persons encountering
18 Pingo Foods' products and services will be misled into believing that Pinkberry is
19 affiliated with or related to Pingo Foods, and any adverse reaction by the public to
20 Pingo Foods, the quality of Pingo Foods' products, or the nature of its business will
21 injure the business reputation of Pinkberry and the goodwill that Pinkberry has
22 enjoyed and enjoys in connection with its PINKBERRY Marks.

23
24 **SEVENTH CLAIM FOR RELIEF**
25 **UNJUST ENRICHMENT**

26 59. Pinkberry repeats paragraphs 1 through 58 above, and incorporates the
27 allegations thereof as if herein set forth in their entirety.

28 60. As a result of its conduct, Pingo Foods has been unjustly enriched at the

1 expense of Pinkberry and the law thereby implies a contract by which Pingo Foods
2 must pay to Pinkberry the amount by which, in equity and good conscience, Pingo
3 Foods has been unjustly enriched at Pinkberry's expense.

4
5 **WHEREFORE**, Pinkberry seeks judgment against Pingo Foods as follows:

6 1. That Pingo Foods and its agents, officers, servants, employees,
7 representatives, licensees, franchisees, successors, assigns, attorneys and all other
8 persons who are acting in concert or participation with any of them, and each of them,
9 be preliminarily and permanently enjoined from any further infringement of the
10 PINKBERRY Trade Dress;

11 2. That Pingo Foods and its agents, officers, servants, employees,
12 representatives, licensees, franchisees, successors, assigns, attorneys and all other
13 persons who are acting in concert or participation with any of them, and each of them,
14 be preliminarily and permanently enjoined from any further use of the PINGO
15 YOGURT Mark or any other trademark, trade name or other designation that is
16 confusingly similar to the PINKBERRY Marks;

17 3. That Pingo Foods and its agents, officers, servants, employees,
18 representatives, licensees, franchisees, successors, assigns, attorneys and all other
19 persons who are acting in concert or participation with any of them, and each of them,
20 be preliminarily and permanently enjoined from any further acts of unfair competition
21 against Pinkberry;

22 4. That Pingo Foods be required to file with the Court and serve on
23 Pinkberry within thirty (30) days after entry of the injunction, a declaration under oath
24 setting forth in detail the manner and form in which Pingo Foods has complied with
25 the injunctions;

26 5. That, pursuant to 15 U.S.C. § 1117, Pingo Foods be held liable for all
27 damages suffered by Pinkberry resulting from the acts alleged herein;

28 6. That Pinkberry receive an award in the amount by which Pingo Foods

1 has been unjustly enriched;

2 7. That, pursuant to 15 U.S.C. § 1117, Pingo Foods be compelled to account
3 to Pinkberry for any and all profits derived by Pingo Foods from its illegal acts
4 complained of herein;

5 8. That, pursuant to California Business and Professions Code § 17203,
6 Pingo Foods be compelled to pay restitution and disgorge its ill-gotten gains.

7 9. That Pingo Foods be ordered pursuant to 15 U.S.C. § 1118 to deliver up
8 for destruction all labels, signs, prints, packages, wrappers, receptacles, advertisement,
9 menus, banners, or the like in possession or custody, or under the control of Pingo
10 Foods bearing the PINGO YOGURT Mark; and

11 10. That the Court declare this action to be an exceptional case and award
12 Pinkberry its full costs and reasonable attorneys' fees pursuant to 15 U.S.C. § 1117.

13 11. That the Court grant Pinkberry any other remedy to which it may be
14 entitled as provided for in 15 U.S.C. §§ 1116 and 1117 and/or under state law; and

15 12. For such other and further relief that the Court deems just and proper.
16

17 DATED: September 9, 2008

18 REED SMITH LLP

19
20 By 

Henry C. Wang

Attorneys for Plaintiff
PINKBERRY, INC.

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